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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 769

SENTA S. ROGERS

v.

LUTHER H. HODGES, Secretary of Commerce, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order, findings of fact and conclusions of law of the United States District Court for the District of Columbia (J.A. 71-73) are unreported.[1] The opinion of the United States Court of Appeals for the District of Columbia Circuit, as amended (Pet. App. A, pp. 15-16), is reported at 297 F. 2d 435.

[1] "J.A." refers to the Joint Appendix filed with the court of appeals below, which is now on file in this Court.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1961 (Pet. App. A, p. 17). A timely petition for rehearing was denied by the court en banc on December 6, 1961, and the opinion was amended on that date (Pet. App. A, p. 15-16). The petition for a writ of certiorari was filed on March 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Civil Service Commission abused its discretion in declining to consider petitioner's untimely appeal from her separation from federal employment through a reduction in force.

REGULATIONS INVOLVED

The pertinent regulations of the Civil Service Commission provide as follows:

21 F.R. 8915, 5 CFR 20.9 (November 16, 1956):

> (a) *Employee appeals to Commission.* Any employee notified of proposed action in a reduction in force who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Commission, stating reasons for believing the proposed action to be improper, within ten (10) days after the date he received notice of the proposed action (or supplementary notice specifying different adverse action), or within ten (10) days after a

decision by the agency on his answer to any notice giving him an opportunity to answer.

(b) *Further appeals.* The Commission office that makes the initial adjudication of an appeal submitted pursuant to paragraph (a) of this section shall notify the employee, or his designated representative, and the agency of the decision in writing. The written decision shall contain notification of the right of either party to appeal to the Board of Appeals and Review, U.S. Civil Service Commission, Washington 25, D. C. (referred to in this section as the 'Board'), within seven (7) days after receipt of such decision.

(c) *Finality of decisions.* It is mandatory for the agency to take corrective action in accordance with the decision of the Commission office that made the initial adjudication of the appeal, unless an appeal is made to the Board. The decision of the Board shall be final. There is no further right of appeal. A recommendation for corrective action by the Board is mandatory and must be complied with by the agency.

(d) *The Commissioners.* The Commissioners may, in their discretion, when, in their judgment, such action appears warranted by the circumstances, reopen and reconsider any previous decision.

23 F.R. 7421, 5 CFR 20.9 (September 24, 1958):

Section 20.9 appeals—(a) *Employee appeals to the Commission.* Any employee who receives a specific notice of reduction in force and who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Commission stating reasons why he believes the action to be taken

or taken is improper. The appeal may be filed at any time from the date the employee receives the notice but not later than ten (10) calendar days after the effective date of the action.

(b) *Further appeals.* The Commission office that makes the initial adjudication of an appeal submitted pursuant to paragraph (a) of this section shall notify the employee, or his designated representative, and the agency of the decision in writing. The written decision shall contain notification of the right of either party to appeal to the Board of Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C. (hereinafter referred to as the 'Board') within seven (7) calendar days after receipt of such decision.

(c) *Extension of time limit.* The time limits specified in paragraphs (a) and (b) of this section may be extended upon a showing that circumstances beyond the control of the appellant or the employing agency prevented the filing of an appeal within the prescribed time limit.

(d) *Finality of decisions.* It is mandatory for the agency to take corrective action in accordance with the decision of the Commission office that made the initial adjudication of the appeal, unless an appeal is made to the Board. The decision of the Board shall be final. There is no further right of appeal. A recommendation for corrective action by the Board is mandatory and must be complied with by the agency.

(e) *The Commissioners.* The Commissioners may, in their discretion, when, in their judgment, such action appears warranted by the circumstances, reopen and reconsider any previous decision.

* * * *

The Federal Personnel Manual, page R-3-33 (issued with Transmittal Sheet No. 567), provides:

* * * *

> This time limit may be extended only if the employee shows to the Commission's satisfaction that circumstances beyond his control prevented him from filing his appeal within the ten-day period.

STATEMENT

On June 27, 1955, petitioner began employment in the National Bureau of Standards of the Department of Commerce with a career-conditional appointment as a Chemist (General), Grade GS-9 (J.A. 3, 12). On March 10, 1957, she was promoted to Grade GS-11 (J.A. 3, 13).

On March 26, 1958, it was decided to abolish the position then assigned to petitioner, because of insufficient funds (J.A. 16). Consequently, the petitioner was advised by letter dated April 8, 1958, that she would be separated from her position, effective May 31, 1958, because of a reduction in force. This notice also advised petitioner that she had a right to appeal the separation to the Civil Service Commission within ten days (10) days of receipt of the notice (J.A. 17-18). Petitioner did not appeal within ten days of receipt of the notice which occurred "a few days after April 8, 1958" (J.A. 6, 19); and she was thereafter separated on May 31, 1958.

By letter dated August 30, 1958, petitioner attempted to appeal her separation to the Appeals Examining Office of the Civil Service Commission,

alleging that she was in the hospital when she received the separation notice; that she could not comply with the ten-day appeal limitation because of her hospitalization; and that she was in the hospital until May 23, 1958 (J.A. 19-20).

In a letter of September 8, 1958, the Appeals Examining Office informed petitioner that it could not consider her untimely appeal (J.A. 20-22). This letter advised petitioner that, before consideration could be given the merits of her appeal, she had to explain why she had not complied with the ten-day limitation. It was pointed out that, under applicable regulations, the Civil Service Commission may extend the ten-day appeal limitation only if an employee shows that he was not aware of the limitation, or that circumstances beyond his control prevented compliance with it. *Supra*, pp. 4, 5. The letter further stated that, on the basis of its appraisal of petitioner's representations, the Appeals Examining Office had concluded that she had not made an adequate showing of unawareness or inability to comply (J.A. 21). Petitioner was informed of her right to appeal further to the Board of Appeals and Review within seven days of receipt of the letter (J.A. 22).

By letter to the Board of Appeals and Review, dated September 16, 1958, petitioner indicated that she had received the letter of the Appeals Examining Office on September 10, 1958, and requested an extension of the seven-day period in which to file a further appeal (J.A. 22). On September 22, 1958, the Board of Appeals and Review granted petitioner's request for an extension of time and advised her that

she could appeal within ten days of receipt of that letter (J.A. 23).

Petitioner did not communicate with the Board of Appeals and Review within the extended ten-day period. Accordingly, the Board considered her case on the material before it. In a letter of October 13, 1958, the Board affirmed the action of the Appeals Examining Office. The Board concluded that petitioner had not established any justification for waiving the initial ten-day time limitation in her case. With respect to the effect of her hospitalization, the Board said (J.A. 24):

> While you were hospitalized until May 23, you have made no showing that circumstances beyond your control prevented you from filing your appeal before August 30, and in the absence of such showing, there is no valid justification for waiving the time limit in your case.

On January 7, 1959, and on January 12, 1959, petitioner communicated with the Commission requesting reconsideration of the Board's action of October 13, 1958 (J.A. 25-28). On January 19, 1959, petitioner was informed by the Commission that all the material in her case would be reviewed for further consideration (J.A. 29). On May 7, 1959, she was informed that the material submitted did not justify consideration of her untimely appeal (J.A. 30).

On June 27, 1960, petitioner brought this suit in the district court against the Secretary of Commerce, the Director of the Bureau of Standards, and the Civil Service Commissioners. The complaint re-

quested a declaratory judgment and a mandatory injunction requiring respondents to restore petitioner to her position at the National Bureau of Standards with back pay (J.A. 1). On October 12, 1960, respondents filed a motion for summary judgment or, in the alternative, to dismiss the complaint (J.A. 31). On January 5, 1961, after argument, the district court granted respondents' motion for summary judgment (J.A. 71). Findings of fact and conclusions of law were filed by the district court on January 16, 1961 (J.A. 71-73).

On petitioner's appeal, the court of appeals affirmed. It held (Pet. App. A, p. 16):

> It does not appear that the administrative officials failed to follow correct procedures or that they acted arbitrarily, either in rejecting her original request for an extension on the basis of the reasons she had then submitted or in not exercising the discretion to reconsider their action under 23 F.R. 7421, 7423 (Sept. 24, 1958), 5 C.F.R. 20.9(e) (1961).
>
> Appellant did not attempt to show the Board any reason for her failure to meet their objection. Of course, we do not pass on the question of the propriety of the Civil Service Commission's rejection of her appeal if, in the future, she adequately explains to that agency her failure to take timely action.

ARGUMENT

Under the regulations of the Civil Service Commission, not challenged here, the merits of an untimely appeal to the Commission by a separated classified

employee can be considered only if the employee shows to the Commission's satisfaction that circumstances beyond his or her control prevented compliance with the ten-day time limitation. *Supra*, pp. 4, 5. Both courts below have determined that petitioner had not made such a showing and that, therefore, the Commission did not act arbitrarily in declining to consider her appeal on its merits. This determination turned upon the particular facts of the case and is plainly correct. Further review is not warranted.[2]

Petitioner received notice of her separation, and of her right to appeal within ten days, "a few days after April 8, 1958" (J.A. 6, 17). Yet she did not appeal until August 30, 1958, some four and one half months later. Her appeal was approximately four months late. She suggests that the fact that she was hospitalized at the time she received the notice prevented her compliance with the ten-day limitation. Yet she admits that her hospitalization terminated—*i.e.*, her disability to comply with the regulation was removed—on May 23, 1958. Nevertheless 98 days elapsed from the time she was released from the hospital until she appealed. It cannot be said that the period of hospitalization, standing alone, constituted a circumstance beyond her control preventing timely filing of her appeal.

In this connection, petitioner restricted her showing before the Commission to the fact that she was hos-

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[2] In the event the Court grants certiorari, respondents may assert, as an alternative basis for affirmance, that this action was barred by laches.

pitalized until May 23, 1958. She did not make known to the Commission the nature of her illness. At no point during the Commission proceedings did she indicate that she was being treated for a mental condition or that her mental capacities were impaired to an extent that she did not understand the reduction-in-force notice.[3] Thus, the Board of Appeals and Review justifiably concluded that, even if the ten-day limitation should have been stayed for the period of hospitalization, there was no explanation for the more than three months delay following the ending of the hospitalization.[4]

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[3] For this reason, petitioner's reliance upon *Covey* v. *Town of Somers*, 351 U.S. 141, holding that notice to a known and legally adjudged mental incompetent is inadequate, is unavailing. The other two "inadequate notice" cases cited by petitioner, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, and *Walker* v. *Town of Hutchinson*, 352 U.S. 112, are equally inapposite since they involved notice by publication, not actual notice.

[4] It should be noted that the court of appeals, in its amended opinion, virtually invited petitioner to return to the Commission with additional information which might warrant a reopening of her case under 23 F.R. 7421-7423 (Sept. 24, 1958), 5 C.F.R. 20.9(e) (1961). *Supra*, p. 8.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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